

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BARCIMEO MERINO CANDELARIA,

Petitioner,

v.

TRISTAN LEMON,

Respondent.

Case No. 1:24-cv-01358-SAB-HC

ORDER TO SHOW CAUSE

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

A petitioner in state custody who is proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state’s alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by

providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

Here, Petitioner acknowledges that Grounds Three through Ten were discovered subsequent to the California Supreme Court’s denial of his petition for review and asks the Court “to remand the new issues raised.” (ECF No. 1 at 8.¹) If Petitioner has not sought relief in the California Supreme Court, the Court cannot proceed to the merits of his claims. 28 U.S.C. § 2254(b)(1). “Federal courts may not adjudicate mixed habeas petitions, that is, those containing both exhausted and unexhausted claims.” Henderson v. Johnson, 710 F.3d 872, 873 (9th Cir. 2013). The Court must dismiss without prejudice a mixed petition containing both exhausted and unexhausted claims to give a petitioner an opportunity to exhaust the claims if he can do so. Lundy, 455 U.S. at 522. However, a petitioner may, at his option, withdraw the unexhausted claims and go forward with the exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict courts must provide habeas litigants with the opportunity to amend their mixed petitions by striking unexhausted claims as an alternative to suffering dismissal.”).² Petitioner may move to withdraw the entire petition and return to federal court when he has finally exhausted his state court remedies.³

Additionally, Petitioner may move to stay and hold in abeyance the petition while he exhausts his claims in state court. Under Rhines v. Weber, 544 U.S. 269 (2005), “stay and abeyance” is available only in limited circumstances, and only when: (1) there is “good cause” for the failure to exhaust; (2) the unexhausted claims are not “plainly meritless”; and (3) the petitioner did not intentionally engage in dilatory litigation tactics. 544 U.S. at 277–78. Under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002), a three-step procedure is used: (1) the petitioner amends his petition to delete any unexhausted claims; (2) the court in its discretion stays the

¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

² The Court notes that “prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles,” such as the bar against second or successive petitions. Burton v. Stewart, 549 U.S. 147, 154 (2007).

³ Although the limitation period tolls while a properly filed request for collateral review is pending in state court, 28 U.S.C. § 2244(d)(2), it does not toll for the time a federal habeas petition is pending in federal court. Duncan v. Walker, 533 U.S. 167, 181–82 (2001).

1 amended, fully exhausted petition, and holds it in abeyance while the petitioner has the
2 opportunity to proceed to state court to exhaust the deleted claims; and (3) once the claims have
3 been exhausted in state court, the petitioner may return to federal court and amend his federal
4 petition to include the newly exhausted claims. Kelly, 315 F.3d at 1070–71 (citing Calderon v.
5 United States Dist. Court (Taylor), 134 F.3d 981, 986 (9th Cir. 1998)).

6 Accordingly, Petitioner is HEREBY ORDERED to SHOW CAUSE within **THIRTY**
7 **(30) days** from the date of service of this order why the petition should not be dismissed for
8 failure to exhaust state remedies.

9 Petitioner is forewarned that failure to follow this order may result in a recommendation
10 for dismissal of the petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner's
11 failure to prosecute or to comply with a court order may result in a dismissal of the action).

12 IT IS SO ORDERED.

13
14 Dated: **December 23, 2024**



STANLEY A. BOONE
United States Magistrate Judge